United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 26, 2008

TO : Joseph P. Norelli, Regional Director

Region 20

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: California Nurses Association/National

Nurses Organizing Committee

(California Pacific Medical Center)

Case 20-CG-69 593-2025-2000

This case was submitted for advice on whether the Union's participation in a rally in front of a hospital constitutes picketing and therefore violated Section 8(g) because the Union did not give ten days notice. We conclude that the charge should be dismissed because the rally did not constitute picketing.

FACTS

The charged Union, California Nurses Association (CNA), represents a unit of nurses at California Pacific Medical Center-St. Luke's Hospital (the Employer). SEIU United Healthcare Workers-West also represents workers at the hospital.

The Employer plans to stop offering acute care services by 2010. Over the past two years, it has closed various departments. Both unions and 21 other community groups, working together as the Coalition to Save St. Luke's Hospital, planned a rally for 5 p.m. on February 13, 2008, the day the Employer ended its neonatal intensive care services.

On February 1, 2008, SEIU-UHW provided notice of the planned rally to the Employer and the Federal Mediation and Conciliation Service (FMCS). CNA did not provide the Employer or FMCS with notice, but on February 12 and 13 announced on its website its plan to participate in the rally.

St. Luke's is bordered on the north by Cesar Chavez Street and on the east by Valencia Street. The main entrance to the hospital faces Cesar Chavez, with a parking lot between the front door and the street. The Employer's director of labor and employee relations glimpsed a group of people standing on Cesar Chavez near Valencia, northeast of the hospital, when he drove toward the hospital just before 6 p.m. on February 13. He entered the hospital

through the emergency room and then proceeded to the main entrance.

The Employer official went out through the main entrance where he saw about 35 people walking and "milling around" on the sidewalk on Cesar Chavez near Valencia. The participants were separated from the hospital entrance by a parking lot, a strip of grass, and a couple of trees. They primarily stayed on the sidewalk, though they briefly stepped into the parking lot. The Employer official recognized a CNA employee as well as three members of CNA's bargaining team holding signs bearing CNA's name that said, "Join the Nurses/Save St. Luke's Hospital/Stop Sutter's Cuts!" He heard the participants shouting but is not sure what they were saying. The participants did not block the lobby entrance or vehicles, nor did they confront anyone. There is no evidence of a strike or work stoppage.

A local TV station's broadcast of the rally focused on the closure of the neonatal unit and community fears of the hospital's shutdown. In the broadcast, participants shout, "Save St. Luke's." A number of CNA signs are visible in the footage, as well a partially-obscured CNA banner that appears to say, "Stop Sutter From Closing Down on Patients." Several people from other organizations hold signs, including one stating "Seniors Saving St. Luke's" and another stating "Salvemos a St. Luke's." None of the participants in the video are marching or moving around; they are all standing still.

ACTION

We agree with the Region that the charge should be dismissed, absent withdrawal, because the rally did not constitute picketing and no one engaged in a strike or other concerted refusal to work. Thus, an 8(g) notice was unnecessary.

Section 8(g) requires unions to give ten days notice prior to "engaging in any strike, picketing, or other concerted refusal to work at any health care institution." The Board has interpreted 8(g) to require notice even if the picketing does not involve a refusal to work because "any picketing may induce actions by others regardless of the picketers' purpose, thereby creating the risk that the delivery of health services will be disrupted." Each union

 $^{^{1}}$ Service Employees Local 535 (Kaiser Foundation), 313 NLRB 1201, 1202 (1994).

participating in picketing must give its own 8(g) notice.² Thus, if the rally constituted picketing, the fact that SEIU gave notice would not excuse CNA's failure to do so.

In Sheet Metal Workers' Intern. Ass'n, Local 15 v. NLRB (Brandon Hospital), 3 the D.C. Circuit concluded that a mock funeral held in front of a hospital did not constitute picketing because it "had none of the coercive character of picketing." The court noted the absence of confrontation and the fact that the entrance was not blocked. Even though the participants walked back and forth in front of the hospital, this activity did not constitute patrolling "in the sense of creating a symbolic barrier to those who would enter the Hospital" because the funeral took place 100 feet from the hospital entrance. Had the union "in any . . . way interfered with or confronted patrons entering or leaving the Hospital," the court would have concluded that the funeral constituted picketing. 5

In evaluating whether picketing has occurred, the Board has repeatedly emphasized the same factors considered by the D.C. Circuit in Brandon Hospital — confrontation and proximity to an entrance. In SEIU Local 87 (Trinity Maintenance), the Board said that "the 'important' or essential feature of picketing is the posting of individuals at entrances to a place of work." And in Chicago Typographical Union No. 16 (Alden Press), the Board stressed that "[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises." For example, the Board found picketing in violation of 8(g) in SEIU Local 535 (Kaiser Foundation Hospitals), where the union held a

² <u>Service Employees Local 200 (Eden Park)</u>, 263 NLRB 400, 401-02 (1982) ("Nor does compliance by one labor organization fulfill the statutory requirement for labor organizations which may later join the dispute").

³ 491 F.3d 429, 438, 440 (D.C. Cir. 2007).

⁴ Id. at 438, fn. *.

 $^{^{5}}$ <u>Id.</u> at 438.

⁶ 312 NLRB 715, 743 (1993).

⁷ 151 NLRB 1666, 1669 (1965) (quoting <u>NLRB v. United</u> <u>Furniture Workers of America</u>, 337 F.2d 936, 940 (2d Cir. 1964)).

^{8 313} NLRB 1201, 1202-03 (1994).

press conference outside a hospital to publicize the results of a national staffing survey. The Board focused on the fact that the participants "were 'milling around' at the hospital entrance" while carrying signs complaining about staffing levels. By contrast, Advice concluded in California Nurses Association (Kaiser Foundation Hospitals) that a demonstration outside a hospital was not picketing because the it occurred away from the entrance, did not involve any kind of confrontation, and solicited public support to keep the hospital open. 11

Here, we conclude that the rally did not constitute picketing because it did not occur at the entrance to the hospital and did not involve confrontation or blocking the entrance. The rally took place far from the hospital entrance (70 feet away) on a public sidewalk at the intersection of two streets, with a parking lot separating the rally participants from the hospital entrance. There is no evidence that participants blocked the entrance or otherwise confronted individuals trying to enter the facility. While the participants here held signs, like in the Board decision in Kaiser Foundation described above, the presence of signs is only one indicium of picketing. It is not determinative where the event takes place far from the entrance and the participants do not confront patrons or employees. 12 Like the protest in the Advice decision in Kaiser Foundation Hospitals, the

 $^{^9}$ <u>Id.</u> at 1201 fn. 1; see also <u>Ranches at Mt. Sinai</u>, 346 NLRB 1251, 1253 (2006) (finding picketing where union "patrolled the area in front of the jobsite entrances" and engaged in activity that "amounted to coercive confrontation").

¹⁰ California Nurses Association (Kaiser Foundation Hospitals), 32-CG-45, Advice Memorandum dated April 22, 1999.

^{11 &}lt;u>Id.</u> See also <u>SEIU Local 3 (Executive Management Services, Inc.)</u>, 25-CC-838, Advice Memorandum dated March 28, 2008, pages 11-12 (finding no picketing at rally "situated away from the building entrance" where "participants did not block the entrances or otherwise confront patrons").

Alden Press, 151 NLRB at 1668-69 (1965) (stating that "patrolling and the carrying of placards . . . do[] not per se establish that 'picketing' . . . was involved"); Mine Workers (New Beckley Mining), 304 NLRB 71, 72 (1991) ("Picket signs or placards, while serving as indicia of picketing, are in no sense essential elements for a finding that picketing occurred.").

rally here was not in any way confrontational, was located far from the entrance, and sought to keep the hospital open. For these reasons, the rally did not constitute picketing.

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.